FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-3501

DEPARTMENT OF HEALTH,

Appellant,

v.

LEAFLY HOLDINGS, INC.,

Appellee.

On appeal from the Division of Administrative Hearings.
Suzanne Van Wyk, Administrative Law Judge.

August 9, 2023

OSTERHAUS, C.J.

Leafly Holdings, Inc. filed a successful unpromulgated rule challenge in 2021, after the Florida Department of Health issued a memorandum warning against medical marijuana treatment centers (MMTCs) in Florida contracting with Leafly for online ordering services. The Department appealed, arguing that Leafly lacked standing to bring its challenge and that its memo merely restated the prohibition in § 381.986(8)(e), Florida Statutes, forbidding contracting between MMTCs and third-party service providers. We affirm. Because the prohibition set forth in the Department's memo goes beyond the text of the statute in restricting Leafly from providing online ordering services to the MMTCs, the memo constitutes an unpromulgated rule that Leafly could lawfully challenge under § 120.56(4).

I.

Appellant Leafly is a Washington State-based company that operates an online website and application-based resource providing cannabis and medical marijuana sales information. Various licensed MMTCs in Florida contracted with Leafly to host online sales-order services whereby Leafly would publish information on its online site of the medical marijuana available from the MMTC's. Qualified patients could view available MMTC products on Leafly's website and put them in an online cart. Leafly would then communicate to the MMTC the customer-picked product information as well as whatever customer information the MMTC required to be collected on the front end of a sale. In turn, the MMTC would communicate back to Leafly when the order was ready for customer pickup. Leafly would notify the customer. And the customer could then go to the MMTC dispensing facility and purchase the product directly from the MMTC. Or, if an MMTC offered delivery services, the MMTC would communicate shipment and delivery information to the customer through Leafly, who would notify the patient electronically of a pending delivery.

Leafly provided these services to various MMTCs for a short time until February 2021, when the Department circulated a memorandum authored by its Marijuana Coordinator, citing § 381.986(8)(e) and referring to complaints received about orders placed through Leafly. The memo considered Leafly's online order hosting services to constitute statutorily prohibited dispensing-related services and warned MMTCs against violating the statute.[*] The memo was circulated to all of Florida's MMTCs. After

[*] The Department's memorandum stated:

RE: Online Ordering Hosted by Third-Party Websites

To All Medical Marijuana Treatment Centers,

The Department of Health, Office of Medical Marijuana Use has received inquiries and complaints regarding qualified patients and caregivers placing orders for the dispensation of marijuana and low-THC cannabis through Leafly.com.

the memo was sent, MMTCs canceled contracts with Leafly. Leafly responded by filing an unadopted rule challenge to the memo. *See* § 120.56(4), Fla. Stat. Leafly's challenge culminated in a hearing before an administrative law judge who agreed with Leafly. The Final Order required the Department to discontinue reliance on the online ordering policy provided in the memo. The Department timely appealed the Final Order.

II.

A.

The Department's first argument on appeal is that Leafly lacked standing to bring an unpromulgated rule challenge to the memo because Leafly wasn't substantially affected by the statement. Standing is a question of law subject to de novo review. *See Office of Ins. Regulation v. Secure Enters., LLC*, 124 So. 3d 332, 336 (Fla. 1st DCA 2013). Under Florida's Administrative Procedure Act, "[a]ny person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a)." § 120.56(4), Fla. Stat. "To establish standing under the 'substantially affected' test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated." *Off. of Ins. Regul. and Fin. Servs. Comm'n v. Secure Enters., LLC*, 124 So. 3d at 336 (quoting *Jacoby v. Fla. Bd. of Med.*,

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Section 381.986(8)(e), Florida Statutes, provides that a licensed medical marijuana treatment center ("MMTC") may not contract for services directly related to the dispensing of marijuana or marijuana delivery devices. Contracting with Leafly.com, or any other third-party website, for services directly related to dispensing is a violation of this provision.

An MMTC licensed by the Department of Health is the only entity permitted to dispense marijuana or marijuana delivery devices or perform services directly related thereto. An MMTC that contracts for services directly related to dispensation may be subject to penalties in accordance with Rule 64-4.210(9)(eee), Florida Administrative Code.

917 So. 2d 358, 360 (Fla. 1st DCA 2005). Here Leafly met its standing burden because the Department's memo explicitly targeted Leafly's online ordering business, identified complaints received about Leafly's work, and warned MMTCs against using Leafly's online ordering services, which caused a loss of business. *See ABC Fine Wine & Spirits v. Target Corp.*, 321 So. 3d 896, 898–99 (Fla. 1st DCA 2021) (recognizing that being regulated by a rule is generally sufficient of itself to establish that a party's substantial interests will be affected); *Jacoby*, 917 So. 2d at 359–60 (holding that an out-of-state physician affected by an interstate-licensure-related restriction met the zone of interest test and could challenge governmental action); *Secure Enters.*, 124 So. 3d at 338-339 (recognizing economic injury to satisfy the injury in fact element of the standing test).

B.

The Department's second argument is that rulemaking wasn't required for it to pronounce contracting with Leafly for online ordering services to be a violation of law. We review the ALJ's conclusions of law in an unadopted rule challenge de novo. *Grabba-Leaf LLC v. Dep't of Bus. & Prof. Regulation*, 257 So. 3d 1205, 1207 (Fla. 1st DCA 2018).

The Department points directly to the statute and argues that because § 381.986(8)(e) itself prohibits third parties from contracting for dispensing-related services, Leafly's unpromulgated rule challenge should have failed. To be sure, if an agency statement merely reiterates a law or restates what is "readily apparent" from the text of a law, the statement is not considered a rule. *See, e.g.*, *Amerisure Mut. Ins. Co. v. Dep't of Fin. Servs.*, 156 So. 3d 520, 532 (Fla. 1st DCA 2015); *Grabba-Leaf LLC*, 257 So. 3d at 1207. Where an agency statement goes beyond the text of a statute, however, to "implement, interpret, or prescribe law or policy or describes the procedure or practice requirements of an agency," it is considered a rule. §§ 120.52(16), 120.56(4)(a), Fla. Stat.; *Jenkins v. State*, 855 So. 2d 1219, 1225 (Fla. 1st DCA 2003) ("An agency statement or policy is a rule if its effect requires compliance, creates certain rights while adversely affecting others, or otherwise has the direct and consistent effect of law.").

Statements that are rules cannot be enforced unless they are formally adopted in accordance with requirements set forth in chapter 120. *See* § 120.54, Fla. Stat.; *Grabba-Leaf*, 257 So. 3d at 1207. If an agency statement meets the definition of a rule but hasn't been adopted as a rule under chapter 120, then it is considered an "unadopted rule." § 120.52(20), Fla. Stat. Agencies may not enforce an unadopted rule against a party's substantial interests. § 120.57(1)(e)1., Fla. Stat.; *Coventry First, LLC v. State, Office of Ins. Regulation*, 38 So. 3d 200, 203 (Fla. 1st DCA 2010) (quoting *Dep't of Revenue v. Vanjaria Enters., Inc.*, 675 So. 2d 252, 255 (Fla. 5th DCA 1996)).

Here, the statute cited by the Department, § 381.986(8)(e), establishes specific constraints on the ability of MMTCs to contract for services. The statute states:

> A licensed medical marijuana treatment center may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices, except that a medical marijuana treatment center licensed pursuant to subparagraph (a)1 may contract with a single entity for the cultivation, processing, transporting, and dispensing of marijuana and marijuana delivery devices.

§ 381.986(8)(e), Fla. Stat. Based on this statute, the Department sent its memo to the MMTCs addressing "Online Ordering Hosted by Third-Party Websites." The memo culminated with an interpretation and implementation of part of § 381.986(8)(e) that announced "[c]ontracting with Leafly.com, or any other third-party website, for [online order hosting] services related to dispensing" violates § 381.986(8)(e)'s prohibition against "[c]ontract[ing] for services directly related to the dispensing of marijuana or marijuana delivery devices."

Now, we must decide whether the Department's prohibition on the use of third-party online order hosting services is "readily apparent" and "simply reiterates" the prohibition in § 381.986(8)(e), or conversely whether rulemaking is required to effectuate this prohibition. *St. Francis Hosp., Inc. v. Dep't of Health and Rehab. Servs*, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989). At the heart of the Department's memo and argument is an

interpretation of "dispensing" and dispensing-related services in § 381.986(8)(e) that forbids MMTCs from contracting for online order hosting services. The statute itself does not define "dispensing" or "directly related to dispensing" and so we look to the dictionary. *Somers v. United States*, 355 So. 3d 887, 891 (Fla. 2022) (referring to contemporaneous dictionary definitions to ascertain the plain and ordinary meanings of terms not defined in the statute). According to the *Merriam–Webster Online Dictionary*, the definition of "dispense" in a medical context means "to prepare and distribute (medication)." Dispense, *Merriam–Webster Online Dictionary*, www.merriam-webster.com/dictionary/dispense. The definition is virtually identical in the *American Heritage Dictionary of the English Language*: "a. To give or deal out, especially in parts or portions: *a machine that dispenses candy; a neighbor who freely dispenses advice*. b. To prepare and give out (medicines)." *Am. Heritage Dictionary of the English Language*, https://ahdictionary.com/word/search.html?q=dispense. *Cf. Black's Law Dictionary* (7th ed. 1999) (defining "dispensary" as "[a] place where drugs are prepared or distributed.").

Applying these definitions, the record here reflects that the work of preparing and distributing or giving out medications are completed by the MMTCs themselves separate from Leafly's online service. Leafly supplies an online ordering interface that displays product information and supplies order information. If an MMTC offers delivery services, it might communicate the shipment information through Leafly, but Leafly does not prepare or deal out the product itself. We recognize that Leafly's relationship to the dispensing work completed by the MMTC's might bring it within the reach of the statute. But, at the same time, the MMTCs arrangement with Leafly doesn't make it "readily apparent" that the "dispensing" language of § 381.986(8)(e) prohibits MMTCs from using online ordering services in support of their work. Rather, it appears that the Department's interpretation of "dispensing" and its prescription as applied to Leafly's business constitutes a rule. *See* § 120.52(16), Fla. State. (defining a "rule" as an "agency statement . . . that implements, interprets, or prescribes law or policy").

A related problem here with the Department's application of § 381.986(8)(e) to Leafly is that its interpretation "isn't clearly

correct." *Grabba-Leaf LLC*, 257 So. 3d at 1209–10. How far § 381.986(8)(e) goes in forbidding MMTCs from contracting with third-party providers for the sort of lesser, non-integrated services that Leafly provides is not so apparent.

This case, for instance, involves MMTCs using order hosting websites that facilitate connections with potential customers short of making final sales or delivering the product (which the MMTCs do themselves through their retail outlets or by shipping the product directly to customers). Another third-party, transaction-related service used by MMTCs (and cited by the Final Order as being allowed by the Department) is that of third-party vendors who have placed ATM machines in the MMTC's lobbies to facilitate MMTC sales to cash-paying customers. These are two of numerous potential examples of third-party services that MMTCs might rely upon to carry out parts of their businesses (thinking also of internet/software/technology providers, security contractors, payroll/human-resource service providers, seeding/fertilizing/harvesting/labor contractors, etc.) short of contracting with fully integrated providers of cultivation, processing, and dispensing services, which § 381.986(8)(e) more clearly prohibits.

It is here we note that § 381.986(8)(e) prohibits specific third-party contracting activity. The statute conjoins three activities with an "and," forbidding "contract[ing] for services directly related to the cultivation, processing, ***and*** dispensing" of products. *Id.* (emphasis added). Unlike integrated providers of "cultivation, processing, and dispensing" services, Leafly's work only arguably relates to one of the three activities. In other words, the Department's application of the statute to Leafly appears to reinterpret the statutory text along the lines of prohibiting "contract[ing] for services directly related to the cultivation, processing, '***or***' dispensing of marijuana," which isn't how the text reads. All to say, it is not clear from the text of the statute that § 381.986(8)(e) prohibits MMTCs from contracting with third parties like Leafly for discrete, non-integrated services that only relate to "dispensing."

We therefore agree with the ALJ that rulemaking was required here. In reaching this conclusion, we highlight the limits of our holding. We need not finally resolve the question of whether,

or under what conditions, § 381.986(8)(e) prohibits online ordering hosted by third-party websites. *See Grabba-Leaf LLC*, 257 So. 3d at 1211 & n.6 (leaving ultimate questions of statutory interpretation unresolved). Rather, for purposes of this unadopted rule challenge, our more limited conclusion is that the Department's memo does not reiterate § 381.986(8)(e)'s textual prohibition. *See St. Francis Hosp. Inc.*, 553 So. 2d at 1354; *Dep't of Revenue v. U.S. Sugar Corp.*, 388 So. 2d 596, 598 (Fla. 1st DCA 1980).

Finally, we reject the Department's argument that rulemaking here was impracticable. Rulemaking is presumed feasible and practicable. § 120.54(1)(a)1.-2., Fla. Stat. And the Department's argument that rulemaking wasn't practicable here because of § 381.986(8)(e)'s clear prohibition against online ordering hosted by third-party websites falls short of rebutting the presumption for the same reasons discussed above.

III.

We affirm the final order. The Department's memo constitutes a "rule" because it is a statement of general applicability that implements, interprets, or prescribes the requirements of § 381.986(8)(e). § 120.52(16), Fla. Stat. And it constitutes an "unadopted rule" because rulemaking was not undertaken. §§ 120.52(20), 120.54, Fla. Stat.

AFFIRMED.

BILBREY and NORDBY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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